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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

8
9 BRET CHIAFALO and LEVI GUERRA,

10 Plaintiffs,

11 v.

12 JAY INSLEE, in his official capacity as
13 Governor of Washington , BOB FERGUSON,
14 in his office capacity as Attorney General of
Washington, and KIM WYMAN, in her official
capacity as Washington Secretary of State,

15 Defendants.

CASE NO.

PLAINTIFFS MOTION FOR
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

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17 **I. RELIEF REQUESTED**

18 Pursuant to Fed. R. Civ. P. 65(a) and (b) and LCR 65, Plaintiffs Bret Chiafalo and
19 Levi Guerra move for entry of a temporary restraining order and preliminary injunction.

20
21 **II. CERTIFICATE OF COMPLIANCE WITH LCR 65**

22 The undersigned hereby certifies that, pursuant to LCR 65, actual notice of the time of
23 filing of this Motion and copies of all pleadings and papers filed in the action to date have
24 been provided to defendants. A certificate of service of this motion and supporting papers is
25 filed herewith.

26
27 **III. INTRODUCTION**

28 This case concerns the infringement on Plaintiffs' constitutional right to vote as
29 electors for whomever Plaintiffs believe to be the best and most qualified persons for the

1 offices of President and Vice-President of the United States of America. Infringement will
2 operate through Defendants' enforcement of RCW 29A.56.340.

3 Plaintiffs were nominated and selected to be presidential electors for 2016 by the
4 members of the Washington Democratic Party, pursuant to its rules, at the party
5 convention/assembly in April 2016. See Complaint at Exhibit 1. As part of their nomination
6 and selection, Plaintiffs were obligated to sign a pledge to vote for the Democratic Party
7 nominees if the majority of the people in Washington voted for such nominees on November
8 8, 2016. *Id.*

9 Plaintiffs believe that the Republican nominees for President and Vice-President,
10 Donald Trump and Mike Pence, represent a unique danger to the Republic and embody the
11 very reason the Founders created the Electoral College. Plaintiffs' have the right under the
12 Constitution, as electors, to vote for the candidates that they believe are most fit and qualified
13 to run this country, even if that means voting for someone other than the Democratic
14 nominees.

15 Defendants, through enforcement of RCW 29A.56.340, will compel Plaintiffs to vote
16 for a specific set of candidates, Hillary Clinton and Tim Kaine. While Plaintiffs may vote for
17 them, Plaintiffs have a constitutional right to vote for whomever they freely choose and
18 cannot be compelled to vote for any candidate. The danger presented by the Trump/Pence
19 ticket is unique in our nation's history and Plaintiffs seek the ability to exercise their
20 constitutional right as electors to vote for other candidates, whether Democratic or
21 Republican. Yet RCW 29A.56.340 and its concomitant fines will punish Plaintiffs for their
22 exercise of their constitutional rights.

23 **IV. RELEVANT FACTS AND EVIDENCE RELIED UPON**

24 Along with this Motion, Plaintiffs have filed a Verified Complaint for Declaratory and
25 Injunctive Relief (the "Complaint") seeking the Court's declaration of their rights as electors
26 under RCW 29A.56.300 *et seq.* and seeking temporary, preliminary, and permanent injunctive

1 relief. Attached to the Complaint as Exhibits A and B are the Declarations of Bret Chiafalo
2 and Levi Guerra, which are incorporated herein by reference.

3 V. STANDARD OF REVIEW

4 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed
5 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief,
6 that the balance of equities tips in his favor, and that an injunction is in the public interest.”
7 *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 19 (2008). The same legal standard
8 applies to a motion for a temporary restraining order and a motion for a preliminary
9 injunction. *See, e.g., Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n. 7
10 (9th Cir.2001).

11
12 The Ninth Circuit has described two sets of criteria for preliminary injunctive relief.
13 “Under the ‘traditional’ criteria, a plaintiff must show ‘(1) a strong likelihood of success on
14 the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not
15 granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public
16 interest (in certain cases).’” *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1297–98
17 (9th Cir. 2003) (quoting *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th
18 Cir.1995)). “Alternatively, a court may grant the injunction if the plaintiff ‘demonstrates
19 *either* a combination of probable success on the merits and the possibility of irreparable injury
20 *or* that serious questions are raised and the balance of hardships tips sharply in his favor.’” *Id.*
21 (citations omitted) (emphasis in original). “These two alternatives represent ‘extremes of a
22 single continuum,’ rather than two separate tests.” *Clear Channel Outdoor, Inc. v. City of Los*
23 *Angeles*, 340 F.3d 810 (9th Cir.2003). “Thus, the greater the relative hardship to [the party
24 seeking the preliminary injunction,] the less probability of success must be shown.” *Id.*
25 (citation omitted) (alteration in original).
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VI. ARGUMENT

A. Substantial Likelihood of Prevailing on the Merits

Plaintiffs are substantially likely to prevail on the paramount issue that Washington’s elector binding statute, RCW 29A.56.340, is unconstitutional because it violates Article II of the U.S. Constitution, as amended by the Twelfth Amendment, and it compels speech in violation of the First Amendment. “Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions.” *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

1. *The Electoral College is Superfluous if Electors are Forced to Vote for Certain Candidates.*

“[P]olitical parties in the modern sense were not born with the Republic. They were created by necessity, by the need to organize the rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable.” *Ray v. Blair*, 343 U.S. 214, 220-21, (1952).¹ “The presidential electors exercise a federal function in balloting for President and Vice-President but they are not federal officers or agents any more than the state elector who votes for congressmen. They act by authority of the state that in turn receives its authority from the Federal Constitution.” *Id.* at 224-25. Thus, though the states have authority to appoint electors pursuant to Article II § 1, that power cannot “be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws.” *Rhodes*, 393 U.S. at 29.

The Court in *Ray* found requiring electors to sign a pledge to certain candidates was valid and constitutional, but explicitly left open the question of enforcement of statutes like Washington’s, noting: “However, even if such promises of candidates for the electoral college

¹ *Ray* came about when the Democrats in Alabama in the 1948 presidential election refused to vote for Truman because of the pro-civil rights platform, and, instead, voted for Strom Thurmond and formed the Dixiecrats. The party thereafter instituted a pledge for electors that they vote for the party’s nominee.

1 are legally unenforceable because violative of an assumed constitutional freedom of the
2 elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college, it
3 would not follow that the requirement of a pledge in the primary is unconstitutional.” *Ray*,
4 343 U.S. at 230.

5 Only electors vote for the President and Vice-President. *See* U.S. Const. Art II § 1;
6 U.S. Const. Amend. XII. The electoral college was created to be separate, a “small number of
7 persons selected by their fellow-citizens ... most likely to possess the information and
8 discernment requisite to so complicated an investigation” who choose the President and Vice-
9 President. The Federalist No. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
10 The electors act “under circumstances favorable to deliberation.” *Id.*² The electors would be
11 insulated from “mischief,” “tumult,” and “disorder.” *Id.* The electors would be less exposed
12 “to heats and ferments” of the people. *Id.* The Electoral College creates an “obstacle ... to
13 cabal, intrigue, and corruption.” *Id.* Chief among the reasons for the Electoral College was to
14 prevent “foreign powers” from “gain[ing] an improper ascendant in our councils,” might be
15 achieved “by raising a creature of their own to the chief magistracy of the Union.” *Id.* at 412-
16 13. The electors were to “vote for some fit person as President.” *Id.* at 413. Thus, the country
17 would be

18 “afford[ed] a moral certainty that the office of President will seldom fall to the
19 lot of any man who is not in an eminent degree endowed with the requisite
20 qualifications. Talents for low intrigue, and the little arts of popularity, may
21 alone to suffice to elevate a man to the first honors in a single State; but it will
22 require other talents, and a different kind of merit, to establish him in the
23 esteem and confidence of the whole Union”

24 *Id.* at 414.

25 Statutes such as Washington’s, which require electors to vote for a party’s slate of
26 candidates lest the elector be punished with civil fines and penalties, render the electoral

² The electors were excluded from being “those who from situation might be suspected of too great devotion to the President in office.” *Id.* Thus, it is better that members of the Electoral College be ordinary citizens such as Plaintiffs, as opposed to even state political office holders who would always stand to personally benefit by devoting themselves to the President.

1 college superfluous, which violates one of the basic canons of Constitutional law and
2 statutory interpretation. *See Hurtado v. California*, 110 U.S. 516, 534 (1884) (absent clear
3 reason, a court cannot assume a part of the Constitution is superfluous). The Founders did not
4 draft the Constitution so that the President and Vice-President were directly elected by the
5 majority of the popular vote. At most, “the sense of the people should operate in the choice
6 of” President. *Id.* Instead, they created the Electoral College.

7 If the electors in Washington are required to vote for the candidate that wins the
8 majority of the popular vote in Washington, the electors serve no purpose and are rendered
9 superfluous. There can be none of the Hamiltonian-contemplated “deliberation”, for there is
10 nothing to deliberate. No “investigation” can occur if the electors are not allowed to is
11 investigate other options. Insulating electors from the “mischief,” “tumult,” “disorder,” “heats
12 and ferments” of an election and the populace would be meaningless if the electors are forced
13 to vote for the same people that won the majority vote by exploiting such heats, ferments, and
14 disorder.

15 In Federalist No. 68, Hamilton admitted the Electoral College system he had helped
16 create was not “perfect” but it was “at least excellent.” *Id.* Through the early part of the
17 Republic, the Founders realized some flaws in Article II § 1 and it was ultimately amended by
18 the Twelfth Amendment, which changed the means by which the House and Senate voted.
19 Despite the significant changes to the machinations of the Electoral College, nothing changed
20 the fact that the electors were to remain an independent, deliberative, and investigative body.
21 *See IS THE UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT CONSTITUTIONAL?*, 2016 Cardozo
22 L. Rev. De Novo 129, 132-133, 147-148.

23 RCW 29A.56.340 mandates electors vote not through deliberation and choice, but by
24 deign of the state popular vote. This mandate renders superfluous the Electoral College and
25 thereby violates Article II § 1 of the Constitution and the Twelfth Amendment.

26 *2. Washington’s Binding Statute Violates the First Amendment.*

1 Alexander Hamilton explained that electors are to vote their free will and the Founders
2 were fearful of and keen to prevent a demagogue:

3 “dangerous ambition more often lurks behind the specious mask of zeal for the
4 rights of the people than under the forbidden appearance of zeal for the
5 firmness and efficiency of government. History will teach us that the former
6 has been found a much more certain road to the introduction of despotism than
7 the latter, and that of those men who have overturned the liberties of republics,
8 the greatest number have begun their career by paying an obsequious court to
9 the people; commencing demagogues, and ending tyrants.”

10 Federalist No. 1, Hamilton.

11 Washington’s elector binding statute, RCW 29A.56.300, enables demagogues,
12 compels the electors, in contravention of the First Amendment, to vote for them, and
13 eliminates debate among the electors on the vital public issue of whom should be elected
14 President.

15 “Discussion of public issues and debate on the qualifications of candidates are integral
16 to the operation of the system of government established by our Constitution.” *McIntyre v.*
17 *Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995). Such speech “occupies the core of the
18 protection afforded by the First Amendment.” *Id.* “When a law burdens core political speech,
19 we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to
20 serve an overriding state interest.” *Id.* at 347. There is a fundamental “right of qualified voters
21 within a state to cast their ballots and have them counted.” *U.S. v. Classic*, 313 U.S. 299, 315
22 (1941).

23 Any statute that requires people to vote a certain way eliminates political debate in
24 violation of the First Amendment. The Electoral College’s purpose is “deliberation” and
25 “investigation.” Federalist No. 68. Under Washington’s binding statute, there is no
26 deliberation or investigation to be done because the electors are bound to vote for specific
27 candidates no matter what. Thus, RCW 29A.56.340 improperly burdens electors’ core
28 political speech. The law also improperly compels electors to vote in a certain way.

29 The electors are nominated and elected by private political parties. The state itself has

1 little state interest in determining who they are and what they believe. The state is not a
2 political party and has no interest in whom people vote for. The state's only interest is running
3 fair elections in which people are given as much opportunity to vote free from harassment.
4 For example, Washington has a constitutional law that prohibits electioneering at a voting
5 center or ballot drop location during the voting period beginning eighteen days before the
6 election and ends the day of. *See* RCW 29A.84.520. This is constitutional, in part, because it
7 protects the person's ability to vote for their candidate of choice. In contrast, RCW
8 29A.56.340 requires electioneering when it comes to the electors – it requires that electors
9 who do not vote a certain way be forced to do so or pay a penalty (or even be removed by the
10 other electors), thus ensuring someone votes the way the state seeks to compel them. It is
11 difficult to imagine a more impermissible burden on political speech than requiring someone
12 to vote for a specific candidate against their will. The concept is antithetical to the notion of
13 democracy, free speech, and the Electoral College.

14 To uphold RCW 29A.56.340, this Court must find the challenged law advances a
15 compelling state interest, though none exists, and is narrowly tailored. No such law could be
16 sufficiently narrowly tailored because the law seeks to do that which cannot be done – compel
17 someone to vote a specific way. Tailoring the law to require voters cast ballots for only a
18 certain political party advances no state interest because the state itself has no interest in
19 which political party governs it.

20 3. *Washington's Binding Statutes Violate the Fourteenth Amendment.*

21 According to the 2010 census, Washington's population is 7,170,351. *See*
22 <http://www.census.gov/quickfacts/table/PST045215/53>.³ Washington is entitled to twelve
23 electors in the Electoral College – one for its ten Congressional Districts and two for each
24 Senator. Wyoming's 2010 census population was 563,626.⁴ Wyoming has three electoral

25 _____
26 ³ This Court can take judicial notice of census statistics. *We Fong Yue Ting v. United States*, 149 U.S. 698, 734 (1893) (Brewer, J. dissenting); *Skolnick v. Bd. of Comm'rs*, 435 F.2d 361, 363 (7th Cir. 1970).

⁴ *See* <http://www.census.gov/quickfacts/table/PST045215/56>.

1 votes – one for its at-large Congressional District and two for each Senator. Thus, though
2 Washington is nearly thirteen times larger than Wyoming, it has only four times the electors
3 as Wyoming. In other words, the Plaintiffs’ votes are worth 1/4 of the Wyoming electors’
4 votes.

5 Nothing in the Constitution requires or even contemplates that states are to award all
6 of their electoral votes to the candidate who won the majority of the state’s popular vote. To
7 the contrary, the Constitution only allows states to conduct elections in a manner that is
8 consistent with, and do not violate, other provisions of the Constitution, including the
9 Fourteenth Amendment’s equal protection clause. *See Rhodes*, 393 U.S. at 29 (though Article
10 II § 1 “does grant extensive power to the States to pass laws regulating the selection of
11 Electors these granted powers are always subject to the limitation that they may not be
12 exercised in a way that violates other specific provisions of the Constitution. Nor can it be
13 thought that the power to select Electors could be exercised in such a way as to violate
14 express constitutional commands that specifically bar States from passing certain kinds of
15 laws.”). “When the state legislature vests the right to vote for President in its people, the right
16 to vote as the legislature has prescribed is fundamental; and one source of its fundamental
17 nature lies in the equal weight accorded to each vote and the equal dignity owed to each
18 voter.” *Bush v. Gore*, 531 U.S. 98, 104 (2000). “Having once granted the right to vote on
19 equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s
20 vote over that of another.” *Id.* at 104-105. “[T]he right of suffrage can be denied by a
21 debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly
22 prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

23 Washington’s binding statute and similar statutes across the country violate the Equal
24 Protection Clause of the Fourteenth Amendment because they unconstitutionally dilute and
25 debase the weight of Washington’s electors’ votes.

26 For the foregoing reasons, RCW 26A.56.340 violates Article II § 1 of the Constitution

1 and the First, Twelfth and Fourteenth Amendments. Because RCW 29A.56.340 of such
2 violations, Plaintiffs have a substantial likelihood of succeeding on the merits.

3 **B. Irreparable Harm**

4 Plaintiffs will suffer irreparable injury if a preliminary injunction is not issued because
5 they will be forced to vote for Hillary Clinton and Tim Kaine in violation of their right to vote
6 for whomever they choose. If they do not do so, they can be removed by their own party
7 pursuant to RCW 26A.56.340 and not allowed to vote and will be fined \$1,000. They will not
8 be allowed to vote as electors again in this election and will be permanently deprived of their
9 ability to cast a vote for the candidate of their choice. No monetary damages can compensate
10 such a deprivation. The Plaintiffs spent myriad hours, expended great personal effort, and
11 incurred personal expense to attend the various caucuses, assemblies, and conventions to
12 become electors. Their fellow citizens voted for them as electors, in part, because they could
13 be trusted to do what was right and vote not just for default candidates, but for someone
14 whom Plaintiffs believe to be the best suited to run the country.

15 **C. Balance of Hardships**

16 Defendants will not suffer any hardship if an injunction issues. Pursuant to RCW
17 29A.56.320, the parties, not the state or its citizens as a whole, elect presidential electors. The
18 state would only be enjoined from allowing a violation of the Constitution, which is no
19 hardship at all. Similarly, foregoing a \$1,000 penalty for infringing a Washington citizen's
20 exercise of their right to free political speech will work no harm on Washington.

21 In contrast, Plaintiffs will suffer great irreparable hardship. Plaintiffs became electors
22 to become personally involved in the political process beyond simply voting on November 8,
23 2016. They believed they were well-suited to serve as electors to find and vote for the
24 candidates best suited for the offices of President and Vice-President. If removed and replaced
25 or forced to vote a certain way because of fear of suffering a monetary penalty, Plaintiffs will
26 be barred from fulfilling their role as electors and voting for the most fit and qualified

1 candidates. And their right to exercise their free political speech on this signal issue that will
2 only occur once in their lived will have been forever destroyed.

3 **D. Public Interest**

4 The public has an interest in ensuring fit and competent leaders are elected. The
5 majority of voters of this state and this country voted for Hillary Clinton and Timothy Kaine –
6 people are who are fit and competent. However, there is great risk that if every elector in
7 every state votes consistent with the popular vote in their respective states, Hillary Clinton
8 and Timothy Kaine not only will not be elected, but people will be elected whom Plaintiffs
9 believe, based on their deliberation and investigation, are neither fit nor competent. The
10 public has an interest in our presidential electors following the dictates of the Constitution,
11 which allows them to make independent, considered judgments about the President and Vice
12 President and to cast their electoral votes accordingly. In contrast, the public has no interest
13 in forcing Plaintiffs to vote for candidates who may not prevail simply for the sake of party
14 loyalty. Rather, doing so harms the public’s interest in making sure electors do their
15 constitutional duty – elect fit, competent, and qualified candidates.

16 **VII. SECURITY IS UNNECESSARY**

17 Rule 65(c) provides that no preliminary injunction may issue “except upon the giving
18 of security by the applicant, in such sum as the court deems proper.” In noncommercial cases,
19 however, courts should consider the hardship a bond requirement would impose on the party
20 seeking the injunction in addition to the expenses the enjoined party may incur as a result of
21 the injunction. *See, e.g., Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1086 (N.D.
22 Cal. 1997) (quoting *Elliott v. Kieseewetter*, 98 F.3d 47, 59 (3d Cir.1996)). “The Court may
23 waive Rule 65(c)'s bond requirement when the balance of the equities weighs overwhelmingly
24 in favor of the party seeking the injunction.” *Id.*

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VIII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order:

A. Temporarily and preliminarily enjoining and restraining Defendants, and each of their principals, officers, agents, servants, employees, attorneys-in-fact, attorneys-in-law, contractors, consultants, distributors, and any and all persons under the control or in active concert or participation with Defendants, jointly or severally, who receive actual notice of the Court's order or judgment by personal service or otherwise, from enforcing RCW 29A.56.340, including in any way precluding Plaintiffs from voting for the candidates of their choice, fining them for doing so, or otherwise interfering with the vote of the electors on December 19, 2016;

B. Waiving the security requirement of Fed. R. Civ. P. 65(c);

C. Declaring unconstitutional RCW 29A.56.340 and any laws or regulations the intent, purpose, or effect of is to preclude Plaintiffs or other electors from exercising their judgment and free will in voting for whichever candidates Plaintiffs choose for President and Vice-President;

D. For such other and further relief as the Court deems just and proper under the circumstances.

DATED this 8th day of December, 2016.

IMPACT LAW GROUP PLLC

/s/ Sumeer Singla

Sumeer Singla, WSBA #32852

Jonah O. Harrison, WSBA #34576

Attorneys for Plaintiffs